95-1091

Supreme Court, U.S.
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No. _____

In The Supreme Court of The United States

OCTOBER TERM, 1995

THEODORE VICTOR ANDERSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does congressional delegation to a Tax Matters Partner of authority to extend limitations and enter into settlement agreements, without notice to or consent by other partners, satisfy the due process requirements of the Fifth Amendment to the United States Constitution?

II. Is the failure of the Tax Matters Partner and the IRS to provide notice, made further insufficient when the Tax Matters Partner is under investigation by the United States of America concerning the promotion and sale of tax shelters, is thereafter removed as Tax Matters Partner, and is then reappointed as Tax Matters Partner, after which judgment is entered against the partnership?

III. Did the Court of Appeals err in its analysis and application of law concerning the time within which the IRS is required to make an assessment of additional income taxes, thereby severely limiting the finality of bankruptcy cases involving tax liability?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Theodore Victor Anderson respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a-7a) is unreported. The opinion of the District Court (App., 8a-13a) is unreported. The opinion of the Bankruptcy Court (App. 14a-20a) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on August 8,

1995 (App. 1a-9a). The Court of Appeals denied the Petition for Rehearing and Suggestion for Rehearing in Banc on October 6, 1995 (App. 23a-24a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provision involved herein is the Fifth Amendment which provides, in relevant part, that "[n]o person shall be ... deprived of life, liberty or property, without due process of law; . . . ." (App. 25a).

The primary statutory provisions involved in this case are 26 U.S.C. § 6229(a) and (f), § 6231(c)(1)(E) and § 6503(i), formerly (h). (App. 26a-34a). These provisions deal generally with the assessment of taxes and the extension of the relevant statute of limitations. The text of the Fifth Amendment and all other relevant statutory provisions are set out verbatim in Appendix E.

STATEMENT OF THE CASE

This case began as an adversary proceeding filed in a bankruptcy case wherein the Petitioner, Theodore Victor Anderson ("Anderson"), sought to discharge certain claims for additional income taxes, penalties and interest alleged to be due. Federal jurisdiction was first invoked under 28 U.S.C. § 157(b)(2)(I)(O). Appeal from the decision of the Bankruptcy Court was taken pursuant to 28 U.S.C. § 158(a)(1). Appeal from the decision of the District Court was taken pursuant to 28 U.S.C. § 1291.

The United States of America, *ex rel.* Internal Revenue Service ("IRS"), argued that as a result of the application of various provisions of the Internal Revenue Code relating to assessment of taxes and extensions of periods of limitation, that all taxes sought to be discharged were nondischargeable. The Bankruptcy Court found that certain interest and penalties were discharged, but that the principal amount, together with some interest, was nondischargeable. Anderson appealed that determination to District Court.

Anderson also raised for the first time as an issue on appeal to the District Court, a due process violation resulting from the application of those laws dealing with assessment of taxes and extensions of statutes of limitation without notice to Anderson. Although the District Court referred to Anderson's Fifth Amendment due process argument as being untimely, the District Court nonetheless ruled on the issue and held that no due process violation existed.

On appeal to the Tenth Circuit Court of Appeals, the judgment of the Bankruptcy Court and District Court relating to the extension of the statute of limitations was affirmed. Although Anderson's due process claim had been ruled on by the District Court, the Court of Appeals held that this issue was not subject to review.

After briefing was completed by both parties and the matter was set for oral argument on May 17, 1995, Anderson discovered the existence of an action filed by the United States of America against Samuel L. Winer, the Tax Matters Partner ("TMP") of the partnership in which Anderson participated.

Anderson submitted this information as Supplemental Authority immediately upon his discovery. This Supplemental Authority was filed on April 27, 1995. However, no reference was made to this Supplemental Authority by the Court in its opinion. The facts of this lawsuit coupled with congressional indifference as to whether notice is provided to taxpayers by the TMP, or otherwise, brings sharply into focus the trampling of Anderson's due process rights and highlights the critical need for notice to be provided to all similarly situated taxpayers.

The Court of Appeals entered its judgment on August 8, 1995 and denied a Petition for Rehearing and Suggestion for Rehearing in Banc on October 6, 1995. Anderson timely files herein his Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

Taxpayers can reasonably expect that they will be given notice of a proceeding which results in a final determination of tax liability. An arbitrary denial of notice of such a determination rises to the level of a constitutional infirmity that violates the Fifth Amendment's due process clause. The removal and appointment of a TMP by the United States when the TMP is under investigation by the United States for partnership related matters, further taints the determination of tax liability. Likewise, taxpayers are entitled to fair and consistent application of the Internal Revenue Code and enforcement of regulatory legislation. Plenary consideration is necessary to effectively address this constitutional infirmity and the erroneous statutory interpretation.

I. Does congressional delegation to a Tax Matters Partner of authority to extend limitations and enter into settlement agreements, without notice to or consent by other partners, satisfy the due process requirements of the Fifth Amendment to the United States Constitution?

It cannot be disputed that the IRS, through the Secretary of the Treasury, has broad latitude in adopting enforcement techniques helpful in performing its tax enforcement responsibilities. Congressional intent in this regard is expressed throughout the Internal Revenue Code. *United States vs. Euge,* 440 U.S. 707, 716 (1980).

With regard to the appointment of a Tax Matters Partner ("TMP"), Anderson concedes the existence of an administrative burden on the IRS in providing notice to each partner of a partnership. The appointment of a TMP eases that administrative burden and assists the Secretary in performing enforcement responsibilities.

However, when notice is provided only to a congressionally delegated person, the TMP, without a requirement that notice actually be given to those parties allegedly represented by the TMP, the rights of the partner/taxpayer can be irreparably damaged. Traditional notions of fair play arguably support a requirement that a taxpayer be provided notice if action proposed to be taken results in tax liability. The notice provided by statute, however, is notice to the TMP.

In fact, Congress sanctions this lack of notice to the taxpayer in 26 U.S.C. § 6230(f). This section provides that the

failure of a TMP to provide any notice or perform any act required, does not affect the applicability of any proceeding or adjustment to the partner not receiving notice.

The due process clause of the Fifth Amendment is a restraint on the legislative, executive and judicial powers of government. The attempt to afford Anderson his right to due process by providing notice to the TMP may be administratively defensible-but it is constitutionally impermissible. Any such feigned statutory attempt at affording due process has long since been rejected. *Murray vs. Hoboken Land Co.*, 59 U.S. 277 (1856). This attempted Fifth Amendment compliance must be rejected here as well.

This Court has previously held that mere compliance with a statute does not constitute notice. *Covey vs. Town of Somers*, 351 U.S. 141 (1956). Surely a taxpayer cannot be divested of this right to notice simply by Congress enacting legislation that says it makes no difference whether the taxpayer receives notice. The concept of notice and the opportunity to be heard has been defined as a "fundamental requirement in any proceeding which is to be accorded finality..." *Mullane vs. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950). Anderson did not receive notice. Title 26 U.S.C. § 6230(f) does not justify the lack of notice.

To establish a cognizable property interest within the meaning of the due process clause of the Fifth Amendment,

> "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of

> entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

Board of Regents of State Colleges vs. Roth, 408 U.S. 564, 577 (1972). Anderson clearly has a legitimate claim of entitlement to a property interest that was affected by the partnership proceedings upon imposition of tax liability.

Mennonite Board of Missions vs. Adams, 462 U.S. 791 (1983), dealt with the notice required to advise someone that a constitutionally protected property right was being affected. In *Mennonite,* this Court held:

> Notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

462 U.S. at 800. (Emphasis in original).

As conceded above, requiring the IRS to provide notice to each individual partner that limitations are being extended would have some adverse impact on its administrative duties. A requirement that notice be provided to other partners through a designated party, such as the TMP, may be a reasonable accommodation to relieve this burden.

However, the right to receive notice and the opportunity to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane vs. Central*

Hanover Bank and Trust Company, 399 U.S. 306, 314 (1950). If the IRS is not required to provide notice and the TMP fails or refuses to provide notice, the taxpayer cannot know whether to "appear or default, acquiesce or contest."

The Internal Revenue Code in § 6224(b)(1)(A) provides that a partner may at any time waive any right the partner has. However, any such waiver must be in writing and filed with the Secretary. 26 U.S.C. § 6224(b)(2). Additionally, a TMP may bind other partners to a settlement reached with the Secretary. 26 U.S.C. § 6224(c)(3). An exception to this rule is set forth in § 6224(c)(3)(b). This section provides that the TMP may not bind other partners who file a statement with the Secretary stating that the TMP shall not have the authority to enter into a settlement agreement on behalf of such partner. First, however, the taxpayer must know a settlement is proposed, to be able to decide whether to file such a written statement with the Secretary. Thus, the query of the Court of Appeals concerning Anderson's failure to take advantage of the "opt out" provisions of § 6224(c)(3)(b) is particularly appropriate.[1]

If Anderson had known the TMP was taking action concerning extension of limitations, settlement, or similar issues, Anderson could have taken some action. Unfortunately, by the time this discovery was made, the damage was complete and irreparable. Surely Anderson is entitled to notice. If the TMP does not provide notice and the taxpayer does not in fact have

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[1] The Court of Appeals noted that Anderson apparently failed to take advantage of the "opt out" provisions of § 6224(c)(3)(b). The Court queried why this "opt out" provision would not satisfy the due process requirements of the Fifth Amendment. See, App. 6a, ftnt. 5.

notice, a thirty-two cent notice by mail to one partner or to one hundred partners is not so great an administrative burden on the IRS as to allow dispensing with this notice.

Finally, Anderson and other taxpayers participating in this investment happened to participate through a partnership. However, if the promoter of the investment had chosen a Subchapter S corporation as the investment vehicle, the IRS would have been specifically required to provide notice to Anderson.

Title 26 U.S.C. § 6244 provides that the provisions of Subchapter C relating to tax treatment of partnership items are extended to and made applicable to the tax treatment of Subchapter S items. Thus, if Anderson had made his investment through a Subchapter S corporation rather than a partnership, 26 U.S.C. § 6243 requires that notice be provided to Anderson. This section provides that each shareholder of a Subchapter S corporation "shall be given notice of, and the right to participate in, any administrative or judicial proceedings for the determination at the corporate level of any Subchapter S item."

That is, the precise notice Anderson complains is lacking in a partnership context is set forth as a specific requirement in a Subchapter S context. Thus, Congress sanctions the failure to provide notice to taxpayers participating in an investment of this kind under partnership laws. On the other hand, those taxpayers so lucky as to have invested in the same investment through a Subchapter S corporation are specifically entitled, by statute, to notice of actions being taken concerning their interest. Such disparate treatment-providing notice to shareholders, but not to partners-constitutes yet another constitutional infirmity by

implicating the equal protection component of the due process clause.

The equal protection component of the due process clause of the Fifth Amendment is a limitation on the power of making classifications in the enactment and enforcement of regulatory legislation. Consequently, a law may violate due process if it is arbitrary and unreasonable. It violates equal protection if a group subjected to regulation has been arbitrarily selected and defined. *Pyeatte vs. Board of Regents of University of Oklahoma,* 102 F. Supp. 407 (D.S. Okla. 1951), *aff'd.,* 342 U.S. 936 (1952). Providing notice to Subchapter S shareholders, but not to partners in a partnership, constitutes a denial of equal protection.

Insuring notice to taxpayers is practical and reasonable and is a proper extension of the concept of due process.

II. Is the failure of the Tax Matters Partner and the IRS to provide notice, made further insufficient when the Tax Matters Partner is under investigation by the United States of America concerning the promotion and sale of tax shelters, is thereafter removed as Tax Matters Partner, and is then reappointed as Tax Matters Partner, after which judgment is entered against the partnership?

Anderson has acknowledged that the IRS has broad latitude in adopting techniques helpful in performing its tax enforcement responsibilities. *Euge,* at 716. It is doubtful, however, that Congress envisioned the techniques used by the IRS in this case.

Anderson was sold an investment in a partnership named Davenport Recycling Associates. Samuel L. Winer was the pro-

moter of and Tax Matters Partner ("TMP") for Davenport. Winer was also the promoter of and TMP for eleven other similar partnerships. Prior to Anderson's investment in Davenport in 1982, the United States of America had been investigating the activities of Winer in promoting tax shelters.

On August 17, 1984, the United States of America filed a Complaint against Samuel L. Winer and Winer Development Corporation in the United States District Court for the Middle District of Florida, seeking a permanent injunction against him and seeking his removal as TMP for Davenport and the eleven other limited partnerships. According to the IRS Complaint, Winer "had a long history selling and promoting tax shelters". The IRS asserted revenue losses in the Complaint of "more than $19,000,000 for the 1982 tax year alone in the Winer tax shelters."

The Court ordered Winer to resign from his position as TMP by its Order entered on January 27, 1986. Winer was ordered to send notice of his resignation to all partners in the twelve partnerships. Nevertheless, even though the IRS was investigating Winer concerning the $19,000,000 revenue loss, the IRS sought and obtained Winer's signature extending limitations on behalf of Davenport for calendar year 1982 and other tax years both before and after the final judgment of permanent injunction was entered against Winer. A final judgment of permanent injunction enjoining Winer from further participation in tax shelters was entered against Winer on February 18, 1986. Finally, by an agreed joint Order entered on September 17, 1986, Winer was reinstated as TMP.

Thus, on October 8, 1985, during the pendency of the IRS investigation of the $19,000,000 revenue loss sustained because of the actions of Winer, Winer purportedly extended the statute of limitations for calendar year 1982. On April 29, 1987, after Winer had been permanently enjoined from participating in tax shelters; after he was removed by Court Order as TMP for creating the means for the $19,000,000 revenue loss; and after he was reinstated; Winer once again purportedly extended limitations for the 1982 calendar year, thereby insuring that the $19,000,000 revenue loss could still be assessed against Anderson and other unsuspecting taxpayers. All of the foregoing was presented in the Supplemental Authority filed in the Court of Appeals on April 27, 1995.

Anderson had no notice of the investigation of Winer that was underway prior to his investment in Davenport Recycling Associates in 1982. Anderson had no notice that a lawsuit was filed against Winer on August 17, 1984. He had no notice of the Order by the District Court for the Middle District of Florida requiring Winer to provide notice of Winer's removal as TMP. He had no notice of Winer's removal as TMP for both Davenport and eleven other similar partnerships and the entry of a permanent injunction against Winer. Anderson had no notice that the United States of America asked that Winer be reinstated as TMP. He had no notice of the attempted reinstatement of Winer as TMP on September 17, 1986.

When notice is provided only to a congressionally delegated TMP, without a requirement that notice actually be given to those parties allegedly represented by the TMP, the

rights of the taxpayer can be dramatically impacted. As conceded above, it may be argued that as an administrative matter, the IRS should not be required to provide notice to each taxpayer individually.

However, if the designated TMP is under investigation for matters directly related to the partnerships he is promoting and he is ordered to resign as TMP and provide notice of the same to all other partners, but fails to do so, such activity might be of some importance to a taxpayer. When the TMP is permanently enjoined from further participation in tax shelters, a taxpayer might ask questions. When the former TMP is then reappointed as successor TMP at the conclusion of his being investigated, again without notice to the taxpayer, a taxpayer may have more than just a casual interest in this information. The act of attempting to reinstate Winer as TMP constitutes a fraud upon Anderson and the United States District Court for the Middle District of Florida. Winer's authority as TMP was seriously suspect.

Thereafter, in a case filed in the United States Tax Court, captioned *Davenport Recycling Associates, Sam Winer, Tax Matters Partner, vs. Commissioner of Internal Revenue,* Docket No. 12801-89, Winer continued his "representation" of the partnership. This "representation" resulted in a judgment in favor of the IRS resulting in the fixing of liability of almost $19,000,000 against the partnership and the partners whose interest he allegedly represented.

Whether Winer or the IRS bothered to mention that Winer had been forced to resign as TMP and was enjoined from further serving as a TMP in any partnership is unknown. However,

Winer's alleged representation of Anderson and other partners by consenting to a judgment in favor of the IRS must be examined when the result is the fixing of liability of $19,000,000 on the partners whose interest he allegedly represented.

It is not unreasonable to think that Anderson and other unsuspecting taxpayers might have been interested in these matters. If Anderson had been aware of a settlement agreement he might have elected to file a statement providing that Winer would not have authority to enter into a settlement agreement on his behalf.[2] If Anderson had known any of the following facts, he might have taken some action.

1. That Winer was under investigation for his activities in promoting tax shelters.
2. That a Complaint was filed seeking a permanent injunction against him to enjoin him from further participation in tax shelters.
3. That the IRS was seeking his removal as TMP for twelve limited partnerships.
4. That the District Court for the Middle District of Florida had ordered Winer to resign and entered a permanent injunction against him.
5. That Winer was required to give notice of his resignation to other partners and failed to do so.
6. That Winer was reinstated in spite of the allegations made against him by the IRS;

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[2] *See*, ftnt. 1, *supra*.

7. That Winer would agree to a judgment fixing $19,000,000 of tax liability.

Anderson was, of course, unaware of any of the foregoing. The United States knew. Winer knew. No one told Anderson. Anderson's $25,000 investment in 1982 resulted in a 1990 tax bill that had by then increased to about $200,000. Bankruptcy eliminated some penalties and interest. Thus, Anderson now "only" owes about $136,000 plus interest from March 1, 1993, until paid. (App. 21a-22a). A taxpayer who invested $25,000 in one of these partnerships, but who did not file bankruptcy, now owes an amount in excess of $250,000. Thus, the $19,000,000 originally owed by the partners in these partnerships would now equal approximately $190,000,000, if no payments had been made.

The IRS may have been unaware of some or all of the foregoing. However, when the government is running roughshod over the rights of taxpayers to secure payment of $19,000,000 in tax liability and the amount due balloons tenfold over thirteen years, such facts raise serious questions as to the actions of the government and as to the validity of any attempted extension of limitations, or any other act, taken by the TMP. Judicial scrutiny is critically needed.

III. Did the Court of Appeals err in its analysis and application of law concerning the time within which the IRS is required to make an assessment of additional income taxes, thereby severely limiting the finality of bankruptcy cases involving tax liability?

Anderson argues that the Court of Appeals erred in its interpretation of various provisions of the Internal Revenue Code found in Chapter 63, entitled Assessment and in Chapter 66, entitled Limitations. Anderson further argues that upon proper application of these sections, the assessment of taxes was not timely and that, accordingly, Anderson does not owe the tax liability for the tax years in question.

Interpreting the Internal Revenue Code can be an exceedingly difficult task. Judge Learned Hand described the Internal Revenue code as a "fantastic labyrinth" whose

> ...words...merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception...that offer no handle to seize hold of...[that] leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time...Again and again I have found myself utterly bewildered by the involution of phrase with phrase and of term with term,

Learned Hand, "Thomas Walter Swan," LVII *Yale Law Journal* 167, 169 (December 1947). Nonetheless, conflicting provisions must be harmonized if possible.

The interpretation placed upon the relevant statutory provisions by the Court of Appeals produces a result which, in a bankruptcy context, severely limits the authority of Bankruptcy Courts to enter orders finally disposing of bankruptcy matters. If Bankruptcy Court orders are subject to a never-ending maze of statutes and regulations extending a final determination of the amount of tax due, a Chapter 7 debtor under the Bankruptcy

Code may have his "fresh start" delayed for a decade or more before final resolution. Likewise, a Chapter 11 or Chapter 13 debtor may also be subject to the same delay, during which no Plan could be confirmed.

Indeed, in its final brief in the Court of Appeals, the IRS incredibly asserts that its previous argument for extension of the statute of limitations for assessment was incorrect. Instead of an extension to December 30, 1991, argues the IRS, the final date for assessment is November 22, 1995-some thirteen years after the tax year in question.

Both Anderson and the IRS agree generally on the interpretation and application of the statutory provisions governing extension of limitations found in 26 U.S.C. §§ 6229 and 6231. However, Anderson and the IRS disagree on the interpretation and application of the 26 U.S.C. § 6229(f) and § 6503(i), formerly (h), which become effective upon the filing of bankruptcy.

Once a bankruptcy petition is filed, § 6229(f) and § 6231(c)(1)(E) are read together to convert all partnership items to nonpartnership items. Such items are then no longer governed by the assessment and limitations periods applicable to partnerships, but become subject to the limitation and assessment statute set forth in § 6503(i).

The statutory interpretation argued by the IRS concerning the extension of limitations is untenable. Although there can be only one correct interpretation of the date to which the statute of limitations was extended, only Anderson's argument focuses on § 6503(i) which deals exclusively with bankruptcy. In any event,

the last argument made by the IRS that the final date for assessment is November 22, 1995, is far from harmonizing these provisions of the Internal Revenue Code.

It is especially important that Bankruptcy Court matters be brought quickly to conclusion. The Chapter 7 debtor waiting ten or fifteen years to obtain his "fresh start", or a Chapter 11 or Chapter 13 debtor being subject to the same delay before a Plan can be confirmed, falls woefully short of the goal of quick and final resolutions. The Court of Appeals analysis interferes with the attainment of that goal. If this Court finds that Anderson has been provided the due process to which he is constitutionally entitled, the Court must nonetheless grant the Petition for Writ of Certiorari and reexamine the statutory analysis of the Court of Appeals.

THE QUESTIONS PRESENTED ARE IMPORTANT

Administration of the tax laws and compliance with those laws by taxpayers is an exceedingly important issue. Maintaining compliance, which to a great extent is voluntary, is critical to the continued functioning of the tax collection system. The expectation of consistent application of the Internal Revenue Code and other regulatory legislation is instrumental to the continued smooth operation of the system and the high compliance rate with these laws and regulations.

The right to receive notice and the opportunity to be heard concerning a proceeding that will adversely affect the property interest of a United States citizen is deeply ingrained in United States constitutional law. An error in congressional judgment as

to whether notice ought to be provided under a specific set of statutory provisions is subject to review and subject to change if the denial of notice is arbitrary and unreasonable. Further, statutes and regulations are intended to be uniformly applied to all citizens. Failure to apply these laws and regulations uniformly is a violation of the equal protection component of the due process clause and is also subject to review.

Anderson invested in a partnership in 1982. Eight years later he sought the protection of the United States Bankruptcy Code. More than five years after that, he has discovered that before he ever made his investment the government began an investigation of the party designated by statute to represent his interest. According to the IRS, the investigation of that representative and all related matters may have only concluded on November 22, 1995.

The United States has gathered information for more than thirteen years concerning these matters. The conduct of the United States in its handling of those matters involving the Tax Matters Partner and the claim against Anderson brings sharply into focus the trampling of Anderson's due process rights. These issues merit the Court's attention and review.

CONCLUSION

The Petition for a Writ of Certiorari to review the decision of the Tenth Circuit Court of Appeals should be granted.

Respectfully submitted,
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December 1995

APPENDIX

FILED
United States Court of Appeals
Tenth Circuit
AUG 08 1995
PATRICK FISHER
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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

In re:	)
THEODORE VICTOR ANDERSON,	)
Debtor.	)
	) No. 94-5165
THEODORE VICTOR ANDERSON,	) (D.C. No. 93-C-0124-B)
Plaintiff-Appellant,	) (Bktcy. No. 90-B-02167-W)
	) (Adv. No. 92-0004-W)
v.	) (N.D. Okla.)
	)
UNITED STATES OF AMERICA,	)
Defendant-Appellee.	)

ORDER AND JUDGMENT*

Before TACHA and BRORBY, Circuit Judges,
and BROWN,** District Judge.

The primary issue in this case is whether certain taxes assessed against Theodore Victor Anderson are dischargeable in bankruptcy. Resolution of the issue, as it comes before us, depends on whether the taxes were assessed within the time permitted by the statute of limitations. The bankruptcy court found

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of the court's General Order, filed November 29, 1993. 151 F.R.D. 470.

** Honorable Wesley E. Brown, United States Senior District Judge for the District of Kansas, sitting by designation.

that the assessments were timely and entered a judgment in favor of the United States on Mr. Anderson's adversary complaint. That judgment was affirmed on appeal to the district court. Mr. Anderson contends that the lower courts misapplied the statute of limitations. He also argues that he was deprived of property without due process of law because he was not given notice that his "tax matters partner" had agreed to an extension of the limitations period on behalf of the partnership. For the reasons expressed herein, we affirm the judgment.

Facts. The relevant facts on the statute of limitations question are undisputed. Mr. Anderson was a limited partner in a partnership named the Davenport Recycling Association. The partnership timely filed forms for the taxable years 1982, 1983 and 1984 reporting its items of income, deductions, and credits. Mr. Anderson claimed his share of the partnership items on his federal income tax returns for those years. The Internal Revenue Service subsequently began an audit of the partnership's returns for 1982-84. During the audit, Samuel L. Winer, the partnership's "tax matters partner,"[1] signed forms consenting to an extension of time for assessing tax attributable to partnership items. The extensions ostensibly gave the IRS until December 31, 1989, to assess against Mr. Anderson and the other partner's taxes attributable to partnership items from 1982-84.

The IRS determined that the partnership was an abusive tax shelter and on May 15, 1989, mailed notice of a Final Partnership Administrative Adjustment ("FPAA") to the partnership's tax matters partner and to Mr. Anderson, disallowing various deductions and making numerous adjustments to the partnership returns. On June 9, 1989, the tax matters partner filed a petition in the U.S. Tax Court contesting the adjustments. On

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[1] "Tax matters partner" is defined at § 6231(a) (7) of the Internal Revenue Code.

August 1, 1990, Mr. Anderson filed a petition for relief under Chapter 7 of the Bankruptcy Code. The record indicates that no proof of claim was filed for the taxes in the bankruptcy nor was any request made to have the bankruptcy court determine the debtor's liability for the taxes. Mr. Anderson was granted a discharge on November 30, 1990.

On May 7, 1991, the IRS issued a statutory notice of deficiency to Mr. Anderson for the years 1982-84. The IRS made assessments against him for the taxes on October 14, 1991, and October 28, 1991. On January 11, 1992, Mr. Anderson filed an adversary complaint in the bankruptcy court, seeking a determination that these liabilities had been discharged or were dischargeable. Among other things, he argued that the statute of limitations precluded assessment of the tax.

Discussion. The issue is one of statutory construction; it involves a question of law that we review *de novo. FDIC v. Canfield,* 967 F.2d 443, 445 (10th Cir.), *cert. dismissed,* 113 S.Ct. 516 (1992). After examining the relevant statutory provisions, we conclude that the assessments were made within the limitations period.

Under 26 U.S.C. § 6229(a), the IRS initially had a three-year period (beginning the date each partnership return was filed) in which to assess taxes attributable to partnership items. Pursuant to § 6229(b) (1) (B), this period was extended by agreement of the tax matters partner to December 31, 1989. On May 15, 1989, with over seven months remaining in the limitations period, the IRS made an administrative adjustment to the partnership tax returns. Under subsection (d) of § 6229, this act suspended the running of the statute of limitations for at least one year plus one hundred and fifty days — i.e., through October 11, 1990.[2] On August 1, 1990, while the running of the statute of

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[2] Because the above calculation results in a conclusion that the assessments were timely, we find it unnecessary to address the United States somewhat belated argument that the running of the statute of limitations was suspended until May 25, 1995, a date one year after the tax court's decision on the validity of the FPAA became final. *See* Aple. Br. at 8, n.8.

limitations was thus suspended, Mr. Anderson filed bankruptcy. The effect of filing bankruptcy, pursuant to regulation,[3] was to convert the partnership items to nonpartnership items. The conversion also resulted in a new limitations period under § 6229(f), which provides that in such circumstances the period of limitations for making assessments "shall not expire before the date which is 1 year after the date on which the items become nonpartnership items." As of August 1, 1990, then, the IRS had at least a one-year period to assess the tax.

On May 7, 1991, at least 86 days prior to the end of this one-year period, the IRS issued a statutory notice of deficiency to Mr. Anderson. Pursuant to § 6503(a), the running of the period of limitations with respect to this deficiency[4] was suspended for the period during which the Secretary was prohibited from

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[3]Temp. Treas. Reg. § 301.6231(c)-7T(a), 52 Fed. Reg. 6793 (1987).

[4]Mr. Anderson concedes the government's assertion that the deficiency in question falls within the scope of § 6503(a). See Aplt. Br. at 9, n.17. As best we can determine from examining a seemingly endless series of cross-references, the deficiency does indeed fall within the suspension provision of § 6503(a). Section 6503(a) provides that, with respect to a deficiency described in § 6230(a) (2) (A), the running of the statute of limitations found in § 6229 shall be suspended for the period during which the Secretary is prohibited from making the assessment. Section 6230(a) (2) (A) in turn provides that Subchapter B [setting forth deficiency procedures, including a prohibition on the Secretary's assessment of a tax following notice of a deficiency but during the time that a taxpayer may file a petition with the tax court] shall apply to items which have become nonpartnership items (other than by reason of § 6231(b) (1) (C) dealing with settlement agreements) and are described in § 6231(e) (1) (B). Section 6231(e) (1) (B) refers to items which have become nonpartnership items by reason of 1 or more events described in subsection (b). Subsection (b) includes partnership items that have become nonpartnership items under subsection (c) of § 6231. Subsection (c) authorizes the Secretary to provide regulations for the nonpartnership treatment of partnership items in certain circumstances. As previously noted, pursuant to a regulation issued by the Secretary the filing of the bankruptcy petition by Mr. Anderson caused the conversion of the partnership items to nonpartnership items. *Cf.* Aplt. Br. at 8 (citing *Learned Hand,* Thomas Walter Swan, LVII *Yale Law Journal* 167, 169 (Dec. 1947) (The tax code is a "fantastic labyrinth" whose words "merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception . . . that offer no handle to seize hold of . . . [that] leave in my mind only a confused sense of some vitally important, but successfully concealed, purport, which it is my duty to extract. . . .")

making the assessment and for 60 days thereafter. The Secretary was prohibited from assessing the tax for at least 90 days, *see* § 6213(a), meaning the running of the statute of limitations was suspended until October 4, 1991. On October 4, 1991, the statute began running again, with 86 days remaining in the limitations period, meaning that the limitations period would expire on December 30, 1991. The Secretary assessed the taxes in question on October 14 and 28, 1991, which was within the limitations period.

In reaching this conclusion, we have considered appellant's arguments to the contrary and have rejected them. Most notably, we cannot agree with his assertion that § 6503(h), which suspends the running of the statute of limitations in a bankruptcy case for the period in which the Secretary is prohibited by reason of such case from making the assessment and for sixty days thereafter, is "the applicable statute identifying the limitations period." Aplt. Br. at 13. Section 6503(h) does not establish a limitations period; it merely provides for the suspension of the running of the statute of limitations during bankruptcy cases. In this case, the applicable limitations period upon the filing of the bankruptcy was (at a minimum) the one-year period set forth in § 6229(f). Appellant also asserts that § 6229 cannot supply the limitations period because that section applies only to partnership items, and the bankruptcy meant that the items would be treated as nonpartnership items. Such a view is untenable given the language of § 6229(f), which specifically sets forth a one-year minimum limitations period when there is such a conversion of partnership to nonpartnership items.

Nor can we agree that the suspension of the running of the statute of limitations under § 6503(h) somehow precluded a later suspension pursuant to § 6503(a). Aplt. Rep. Br. at 4. Although we found it necessary to include any period of suspension caused by § 6503(h) in our calculations above, the existence of such a period in no way affects the later suspension pursuant to §

6503(a). Both of these sections suspend the running of the statute when the Secretary is prohibited from making an assessment, although each may do so for a different reason. Subsection (a)'s provisions apply when, among other things, the Secretary is prohibited from making an assessment so that the taxpayer can petition the tax court. *See* § 2613(a). Subsection (h), on the other hand, suspends the statute in a bankruptcy case because the automatic stay may prohibit the Secetary from assessing a tax. *See* S. Rep. No. 1035, 96th Cong., 2nd Sess., 48, *reprinted in* 1980 U.S.C.C.A.N. 7017, 7063. *See also* 11 U.S.C. § 362(a) (6). There appears to be no dispute here that once Mr. Anderson was discharged from bankruptcy, the Secretary was prohibited by virtue of § 6213(a) from assessing the tax for 90 days following the mailing of the notice of deficiency. *Cf.* § 6871(b) (Notwithstanding § 6213(a)'s restrictions, immediate assessment is permitted on the debtor's estate in a bankruptcy case or on the debtor if the liability for the tax has become res judicata in the bankruptcy case.). Given this fact, both logic and the plain language of the statute make clear that the running of the statute was suspended during that prohibition. In sum, we agree with the bankruptcy and district courts that the assessments were timely.

Due Process Claim. Mr. Anderson contends that he was deprived of property without due process of law because he was not notified that his tax matters partner agreed to an extension of the limitations period.[5] For reasons not disclosed in the record, Mr. Anderson failed to raise this argument in the bankruptcy court. When the issue was raised in arguments to the district court, the judge held that the failure to raise it below precluded

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[5]Pursuant to § 6224(a) (3), the tax matters partner may, in certain circumstances, bind other partners by entering into a settlement agreement. This rule does not apply, however, with respect to any partner who timely files a statement with the Secretary providing that the tax matters partner shall not have the authority to enter into a settlement agreement on behalf of such partner. § 6224(a) (3) (B). Appellant filed no such statement with the Secretary. Although we do not decide appellant's due process claim, we note that he has not explained why this "opt out" provision falls short of the requirements of due process.

review, although he proceeded to find that the argument was without merit.

We conclude that the failure to properly raise this issue below precludes our review of it. Appellant emphasizes that this court has discretion to hear matters not raised or argued below. *See Rademacher v. Colorado Ass'n. of Soil Conservation Dist. Med. Ben. Plan,* 11 F.3d 1567, 1571 (10th Cir. 1993). The court will do so, however, "only in the most unusual circumstances." *Id.* The general rule is that "[t]he failure to raise the issue with the trial court precludes review except for the most manifest error." *Id.* We see no manifest error here. The record on appeal contains no statement of undisputed facts, affidavits, deposition excerpts or other materials setting forth the facts surrounding this claim. Under the circumstances, we cannot say that the district court erred in holding that the claim was barred.

Conclusion.

The judgment of the district court is AFFIRMED.

Entered for the Court.

Wesley E. Brown, District Judge

FILED
MAR 28 1994
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:)	
THEODORE VICTOR ANDERSON,)	
Debtor.)	
)	
THEODORE VICTOR ANDERSON,)	93-C-0124-B
Appellant,)	
)	
v.)	
)	
UNITED STATES OF AMERICA,)	
Appellee.)	

ORDER

Now before this court is Anderson's appeal of a decision by the United States Bankruptcy Court for the Northern District of Oklahoma. The Bankruptcy Court found that the tax assessments made by the Internal Revenue Service (IRS) were timely and the debtor must pay the tax principal plus any interest under 26 U.S.C. § 6601(a)(2).

I. Statement of Facts & Procedural History

Debtor was a limited partner in Davenport Recycling Association ("Partership"). One of his partners, Samuel L. Winer, was designated the "tax matters partner." Taxes were owed by Debtor and the partnership for 1982, 1983 and 1984.

The dispute at issue in this case began when Winer, pursuant to 26 U.S.C. § 6229(b)(1)(B), filed *Form 872-P: Consent to Extend the Time to Assess Tax Attributable to Items*

of a Partnership for 1982, 1983 and 1984. The IRS then had until December 31, 1989 to assess the debtors taxes attributable to the partnership. However, the Debtor contends that Winer did not notify him of the extension.

In 1989 — before a correct assessment of the partnership taxes had been made — the IRS determined that the partnership was an "abusive tax shelter."[1] As a result, the IRS disallowed several of the Debtor's previous tax deductions for 1982, 1983, and 1984 and, on May 15, 1989, notified Debtor that he owed more taxes for those years as a result of his participation in the partnership.[2]

On August 1, 1990, following the IRS notification, Debtor filed Chapter 7 bankruptcy. Consequently, under 26 U.S.C. § 6229(f), the IRS had one year to file a Notice of Deficiency against Debtor. The IRS filed such a notice on May 7, 1991 — 86 days before the one-year deadline expired. Then, in October of 1991, the IRS assessed some $200,000 in back taxes against the Debtor.

On January 10, 1992, Debtor asked the Bankruptcy Court to discharge those taxes. The Bankruptcy Court however, concluded that Debtor must pay the taxes owed to the IRS. As a result, Debtor filed the instant appeal.

II. Legal Analysis

Two issues are raised by Debtor. The first is whether the IRS timely notified and assessed taxes against Debtor. The second issue is whether Debtor's Fifth Amendment due process rights were violated by the IRS. Each issue is discussed below.

A. Notification and Assessment of Taxes

Debtor contends that the Bankruptcy Court incorrectly calculated the period of limitation, therefore the assessment

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[1] It is unclear from the record as to why the IRS deemed the partnership an "abusive tax shelter."

[2] The May 15, 1989 notice to Debtor was a "Notice of Final Partnership Administrative Adjustment" for assessments arising from the debtor's partnership interest in Davenport and based on the Tax Equity Fiscal Responsibility Act ("TEFRA").

was not timely. However, for the reasons discussed below, the Bankruptcy Court's decision is affirmed.

The principle of "tacking" has been widely accepted and was illustrated by *Ramirez v. United States,* 538 F.2d 888 (Cl. Ct. 1976). ***See also,*** *Continental Oil Co. v. United States,* 14 F.Supp 533 (1936). In *Ramirez,* the appellant argued that the government's assessment was barred by the statute of limitations. The appellant had entered into an agreement to extend the period for assessment until June 30, 1972. The agreement included the language,

> [E]xcept that if a notice of a deficiency in tax is sent to the taxpayers ... then the time for making any assessment shall be *extended* beyond that date by the number of days during which an assessment is prohibited and for 60 days thereafter.[3]

Ramirez, 538F.2d at 889 (emphasis added). The debtor argued that the 150 days ran from the date of notice, but the court concluded that in essence, the 150 day period is "tacked" to the end of the one-year assessment period allowed by 26 U.S.C. § 6229(f), not to the day notice is sent. The court in *Ramirez* explained "tacking" as "taking the original period of limitations allowing a number of days of suspension during which the period was tolled, and then at the end adding the unexpired period." *Ramirez* 538 F.2d at 892. ***See also,*** *Meridian Wood Products Co., Inc. v. United States,* 725 F.2d 1183, 1187 (1984) and *Aufleger v. Commissioner,* 99 T.C. No. 5 (1992).

In the case at hand, when Debtor filed bankruptcy on August 1, 1990, his partnership items became nonpartnership items[4]

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[3]Although the Consent form signed by Winer, the tax matters partner, did not include such language, 26 U.S.C. § 6503(a) states "the running of the period of limitations shall be *suspended...*"

[4]"Nonpartnership item" means "an item which is (or is treated as) not a partnership item." 26 U.S.C. § 6231(a)(4).

according to Temporary Treasury Regulation 301.6231(c)-7T.[5] Upon that conversion, pursuant to 26 U.S.C. § 6229(f), a one-year period of limitations for the IRS to assess a deficiency took effect. In other words, the IRS had until August 1, 1991 to issue a ***Notice of Assessment.*** The IRS issued such a ***Notice of Assessment*** on May 7, 1991, 86 days before the end of the one-year period. When the IRS issued the notice, the one-year period was suspended for "the period during which the Secretary is prohibited from making the assessment,"—90 days during which the debtor had the opportunity to petition the Tax Court, § 6213(a) — and for "60 days thereafter." 26 U.S.C. § 6503(a). Therefore, the one-year period of limitations was "suspended" for a total of 150 days, or until October 4, 1991.[6] On October 4, 1991, the one-year period in 26 U.S.C. § 6229(f) was no longer "suspended" and it resumed running with 86 days remaining. In other words, the 86 days that the notice was filed in advance of the expiration date of August 1, 1991, were "tacked" on to the October 4, 1991 deadline, making the final day of assessment December 30, 1991. Therefore, the assessments made by the IRS on October 14, 1991 and October 28, 1991 were timely.

Debtor contends that *Clark v. Commissioner,* 90 T.C. 68

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[5]Temporary Treasury Regulation 301.6231(c)-7T states: "The treatment of items as partnership items with respect to a partner named as a debtor in a bankruptcy proceeding will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such partner ... shall be treated as nonpartnership items as of the date the pension naming the person as debtor is filed in bankruptcy."

[6]This court interprets "suspend" as "to interrupt; to cause to cease for a time, to postpone; to stay, delay, or hinder; to discontinue temporarily, but with an expectation or purpose of resumption." Blacks Law Dictionary, 5th ed. (1979).

(1988), should control.[7] The court disagrees. The issue in *Clark* involved the IRS's assessment of deficiency during or directly after the lifting of the automatic stay provision in § 362 of the Bankruptcy Code. *Clark* did not address the period of limitations which controls this case because of the partnership items. In the case at hand, it is not the automatic stay provision that is at issue, but the period of limitations provided by Temporary Treasury Regulation 301.6231(c)-7T and 26 U.S.C. § 6229(f). Instead, *Clark* cited only the provision in 26 U.S.C. § 6503(i), which does not pertain to partnership items. Although the period of limitations referred to in 26 U.S.C. § 6503(i) was extended by agreement in this case, the one year period in 26 U.S.C. § 6229(f) took over when the Bankruptcy petition was filed.

B. Fifth Amendment Due Process Violation

The debtor also raises the issue of whether the delegation to a tax matters partner of the authority to extend the limitations period for assessment of partnership taxes satisfied the due process requirements of the Fifth Amendment to the United States Constitution.

Appellant did not raise this issue before the Bankruptcy Court and this court may not review issues raised for the first

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[7]Petitioner also contends that the Bankruptcy Court abused its discretion by not accepting his argument under *Clark* as it was presented in his "Debtor's Response to United States' Reply in Support of Supplemental Memorandum in Support of Motion for Summary Judgment". The Bankruptcy Court declared that the argument was "beyond the scope of argument permitted by this court's order for supplemental briefing," Order p.5.

Generally, procedural decisions are within the sound discretion of the court. *See Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 330-32 (1971) (trial court within discretion to reject attempt to amend pleadings). It is well settled that unless the court's decision is a gross abuse of that discretion, it is not reviewable. *Mexican Cons. Rv. Co. v. Pinkney*, 149 U.S. 194 (1893). This procedural decision by the court does not constitute a gross abuse of discretion. Even if it did, this court has determined that the argument put forth by petitioner is not meritorious.

time on appeal. *Gundy v. United States,* 728 F.2d 484, 488 (10th Cir. 1984). In any event, when one buys into a partnership, they become subject to certain laws and regulations. These include, "[t]he period described in subsection (a) may be extended ... with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner." 26 U.S.C. § 6229(b)(1)(B).

By vesting this authority in the tax matters partner, Congress does not deprive the other partners of any property right, regardless of whether the tax matters partner notifies them of his actions. Any deprivation of property occurs with the Final Partnership Administrative Adjustment ("FPAA"). Debtor received notice of FPAA on May 15, 1989 and had sufficient time to protect his rights. ***See,*** *Byrd Investments v. Commissioner,* 89 T.C. No.1 (1987).

III. Conclusion

This court holds that the Bankruptcy Court correctly calculated the period of limitations, thus the IRS's assessment of taxes was timely. Furthermore, the vesting of power in the tax matters partner did not violate Debtor's Fifth Amendment due process rights as Debtor had sufficient time to protect his property rights. Therefore, the decision of the Bankruptcy Court is affirmed.

SO ORDERED THIS 28TH DAY OF MAR., 1994.

/s/ Thomas R. Brett

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

FEB 4 1993

DOROTHY A. EVANS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:	)	
THEODORE VICTOR ANDERSON,	)	
Debtor.	)	
	)	
THEODORE VICTOR ANDERSON,	)	Case No. 90-02167-W
Plaintiff,	)	Chapter 7
	)	Adv. No. 92-0004-W
v.	)	
	)	
UNITED STATES OF AMERICA,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On August 24, 1992, this Court issued its order denying both parties' motions for summary judgment herein. However, the Court determined that said motions served to show that "facts and applicable law...are effectively admitted;" scheduled supplementation of legal argument; and declared that, after further briefing as scheduled, "the Court will, as appears appropriate, either set the matter for trial or consider the matter submitted for decision on undisputed facts and briefs," order p. 8. Between September 15, 1992 and November 2, 1992, both parties filed further briefs, replies and responses. Upon consideration thereof, and of the record herein, the Court, pursuant to F.R.B.P. 7052, finds, concludes, and orders as follows.

FINDINGS OF FACT

CONCLUSIONS OF LAW

This is a core proceeding under 28 U.S.C. § 157(b) (2) (I), (O), 11 U.S.C. § 505, 523(a) (1), (7).

The Court has gone over this ground in its order denying motions for summary judgment of August 24, 1992. However, the Court is now persuaded that certain portions of that order are in error and require correction. Therefore, the Court adopts said order of August 24, 1992 and incorporates it herein; but modifies it as appears below.

On p. 4, lines 9-11, said order states that "After...notice of deficiency had been issued, debtor had 90 days within which to petition the Tax Court or to default, see 26 U.S.C. § 6213(f) (1)." This statement was drawn from USA's memorandum of June 29, 1992, p. 4 ¶ 16; but it now appears to be incomplete. The basic rule appears to be stated in § 6213(a), to which (f) (1) is merely corollary.

On p. 4, lines 3-4, said order states that "IRS was required to issue any notice of deficiency within one year after debtor filed bankruptcy, see 26 U.S.C. § 6229(f)." This statement was drawn from USA's memorandum of June 29, 1992, p. 4 ¶ 14; but it now appears to be misleading in one respect. § 6229(f) is a statute of limitation, which gives IRS one year after debtor files bankruptcy in which to *assess* taxes. Issuing notice of deficiency is a mere preliminary thereto, which is not the same as final assessment. Most importantly, the issuing of a notice of deficiency "suspends" the running of the period of limitation for making final assessment, 26 U.S.C. § 6503(a) (1).

On p. 5, lines 16-17, said order states that the Tax Code "require[s] assessment '[w]ithin 90 days...after the notice of deficiency...is mailed,' 26 U.S.C. § 6213(a)..." The statement shows that the Court had to some extent regained the distinction between issuing notice of deficiency and asessment; but it also

shows that the Court had not realized the significance of a "suspension" of the period of limitation for assessment. The Court concentrated on § 6213(a); but the matter turns on § 6503(a) (1).

The Court revises its reasoning on pp. 4-5 accordingly, as follows.

IRS was required to make assessment within one year after debtor filed bankruptcy, § 6229(f). Debtor filed bankruptcy on August 1, 1990; so IRS was required to make assessment by August 1, 1991. On May 7, 1991, eighty-six days before the period of limitation on assessments ran out, IRS issued its notice of deficiency to debtor. After the notice of deficiency had been issued, debtor had ninety days within which to petition the Tax Court or to default, 26 U.S.C. § 6213(a). During these ninety days, IRS was prohibited from taking further action against debtor, and could not complete assessment, *id.* The period of limitation under § 6229(f) was "suspended" during those ninety days wherein IRS was forbidden to complete assessment, 26 U.S.C. § 6503(a) (1). Ninety days after May 7, 1991 was August 5, 1991. Hence the period of limitation was suspended at least until August 5, 1991, when IRS was permitted to resume proceedings for assessment. After that date, the period of limitation was suspended for sixty days more, *id.* Sixty days after August 5, 1991 was October 4, 1991. On October 4, 1991, the original period of limitation ceased to be "suspended"—that is, it resumed running. But it had been interrupted when it still had eighty-six days left to run; so, when the interruption ceased, the period of limitation resumed, and ran on for eighty-six more days before it expired. Eighty-six days after October 4, 1991 was December 30, 1991. So, the period of limitation for making assessment did not finally expire until December 30, 1991. IRS made its assessments on October 14 and October 28, 1991, more than two months before the period of limitation expired. Hence the assessments were timely.

The Court was under the impression that the "principles of 'tacking' " referred to by IRS were, at best, a construct of case law, which was contradicted by the Tax Code itself. This was erroneous. "Tacking" is another way of describing what the Tax Code calls "suspension of the period of limitation for making assessment;" it is provided for by the statutes themselves, primarily by 26 U.S.C. § 6503(a) (1). However, the cases cited by USA in its "Supplemental Memorandum..." were helpful in making this clear to the Court.

In his "...Reply to Supplemental Memorandum..." filed October 6, 1992, debtor argues that the limitation period expired on April 10, 1991. Previously, debtor had argued that the limitation period expired on October 4, 1992. In his "...Response to United States Reply..." thereto filed on November 2, 1992, debtor elaborates on this new theory. This Court asked the parties to argue in more detail how the period of limitation might be extended from October 4 to October 14 and 28. The Court did not ask the parties to argue how the period of limitation might be altogether re-calculated to April 10 or to any other date. Debtor's re-calculation of the applicable period of limitation goes beyond the scope of argument permitted by this Court's order for supplemental briefing. This Court will not ask IRS to hit a moving target; nor will this Court attempt to do so. Accordingly, debtor's new arguments shall be disregarded.

IRS was asked to explain how and why the period of limitation might be extended from October 4 to October 14 and 28. IRS has done so. Debtor was given an opportunity to rebut IRS' further showing. Debtor has not done so. The Court therefore concludes that the assessment occurred within the period of limitation, and was timely.

Debtor's only challenge to the *validity* of the taxes, penalties and interest claimed by IRS was based on alleged untimeliness of the assessment. Since the assessment was timely, debtor's challenge fails; the Court is compelled to hold that

debtor owes the taxes, penalties and interest as assessed, as a debt which is valid and would be enforceable absent bankruptcy.

However, that does not end the matter. In its order of August 24, 1992, the Court agreed with debtor that, even if debtor owed taxes, penalties and interest, the penalty part thereof was dischargeable under 11 U.S.C. § 523(a) (7) as applied by *In re Roberts,* 906 F.2d 1440 (10th Circ. 1990). In its "Supplemental Memorandum...," USA concedes as much. Yet the parties are still not entirely agreed, even as to this point. Debtor asserts that some part of the so-called "interest" is actually a penalty—i.e., that 26 U.S.C. § 6621(a) (2) provides for a low interest rate which is true "interest," while § 6621(c) provides for a higher interest rate whose excess over the § 6621(a) (2) rate must represent a "penalty" which is dischargeable. IRS says that this issue has been decided adversely to debtor in the case of *In Re Hopkins,* 131 B.R. 308 (B.C., N.D. Tex. 1991). Debtor says that *Hopkins* did not reach this issue; and that

> In order to adequately present the issue Debtor must have access to facts that are not presently available, such as total amount claimed by [IRS] as penalties under other Revenue Code Sections; the total amount of "penalty" interest calculated under the provisions of Revenue Code 6621(c); the rate utilized from time to time in that "penalty" interest calculation; and, the time periods for which such a "penalty" interest claim is made by [IRS],

debtor's response filed 11/2/92 pp. 5-6.

This Court has previously held that a so-called "penalty" can actually be a tax which is nondischargeable under § 523(a) (1), *In re Matlock,* 104 B.R. 389 (B.C., N.D. Okl. 1989). Conversely, so-called "interest" may actually be a penalty which is dischargeable under § 523(a) (7) as applied by *In re Roberts,* supra. "Interest" pursuant to 26 U.S.C. § 6621(a) (2) appears to be calculated with reference to market yield under § 1274, and hence is true interest which follows the tax principal and is

nondischargeable. "Interest" pursuant to 26 U.S.C. § 6621(c) is set at a higher rate—at 120% of the ordinary rate under § 6621(a) (2), according to that version of § 6621(c) in effect during the times pertinent hereto. The statute itself expressly assigned the higher rate to "substantial underpayments attributable to tax motivated transactions." This higher rate was obviously intended to penalize and deter tax-dodging, and is *prima facie* punitive in nature.

IRS cites *In re Hopkins,* supra, to the contrary. That case held that "interest" under § 6621(c) was not a penalty but a tax, because in that Court's opinion the Tax Code required this conclusion: "26 U.S.C. § 6601(e)...provides that the word 'tax' includes interest on the tax," *In re Hopkins,* 131 B.R. p. 319. In fact, § 6601(e) does not say that "the word 'tax' includes interest;" it merely says that, for purposes of the Tax Code, interest *follows* the principal tax and is treated together therewith. In any event, the Tax Code's treatment of "tax," and "penalty" and "interest" is not controlling here; what matters is the Bankruptcy Code's treatment of these terms, *In re Matlock,* 104 B.R. p. 391. This Court finds *In re Hopkins,* supra, to be unpersuasive, and declines to follow the same.

Since no reason appears to the contrary, the Court concludes that "interest" under 26 U.S.C. § 6621(c) is in the nature of a penalty, to whatever extent it exceeds the ordinary interest rate under 26 U.S.C. § 6621(a) (2); and is to that extent dischargeable under 11 U.S.C. § 523(a) (7) as applied by *In re Roberts.*

Accordingly, debtor owes IRS the amount assessed in taxes, interest and penalties as a valid debt; and of said total debt, the tax principal, and any interest under 26 U.S.C. § 6601(a) (2), is nondischargeable under 11 U.S.C. § 523(a) (1); further, interest under 26 U.S.C. § 6601(c), to the extent it equals the interest rate under 26 U.S.C. § 6601(a) (2), is also non-dischargeable, but to the extent it exceeds said rate, is in the

nature of a penalty and is dischargeable under 11 U.S.C. § 523(a)(7); and any other penalties are also dischargeable under 11 U.S.C. § 523(a)(7). Judgment shall issue accordingly. The parties have thirty (30) days from the date hereof to fix the appropriate amounts and submit a form of judgment to this Court. If the parties are unable so to do, the Court will consider further proceedings, on motion of either party.

AND IT IS SO ORDERED.
Dated: February 3rd , 1993.

/s/ Mickey D. Wilson
MICKEY D. WILSON
UNITED STATES BANKRUPTCY JUDGE

c: Randall E. Rose (The Owens Law Firm, P.C.)
Douglas H. Frazer (Tax Division, U.S. Dept. of Justice)

FILED
MAR 31 1993
DOROTHY A. EVANS, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OKLAHOMA

APPENDIX D

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

In re:	)
THEODORE VICTOR ANDERSON,	)
Debtor.	) Case No. 90-B-02167-W
	) Chapter 7
THEODORE VICTOR ANDERSON,	)
Plaintiff,	) Adv. No. 92-0004-W
	)
v.	)
	)
UNITED STATES OF AMERICA,	)
Defendant.	)

FINAL ORDER AND JUDGMENT

The Memorandum Opinion and Order filed February 4, 1993 is incorporated by reference in full for the purpose of this final order and judgment. Consistent with that document, the amount of nondischargeable tax and interest that the Court has determined that plaintiff owes to the United States for the deficiency assessments at issue for the years 1982, 1983, and 1984, calculated to March 1, 1993, is $136,678.29. Interest continues to accrue on this amount as permitted by law.

/s/ Mickey D. Wilson

MICKEY D. WILSON
United States Bankruptcy Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of March 1993, a true and accurate copy of the above and foregoing proposed FINAL ORDER AND JUDGMENT was served by mail, postage prepaid, to:

George W. Owens, Esquire
Randall E. Rose, Esquire
15 E. Fifth, Suite 1606
Tulsa, Oklahoma 74103-4306

/s/ Douglas H. Frazer

DOUGLAS H. FRAZER
Trial Attorney
Tax Division
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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THEODORE VICTOR ANDERSON, Plaintiff-Appellant,	)
v.	) No. 94-5165
UNITED STATES OF AMERICA, Defendant-Appellee.	)

ORDER
Entered October 6, 1995

Before TACHA and BRORBY, Circuit Judges, and BROWN,* District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on

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*The Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

PATRICK FISHER, Clerk

By: /s/ Barbara Schermernorn
Barbara Schermernorn, Deputy Clerk

APPENDIX E

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

THE FOLLOWING SECTIONS ARE TAKEN FROM TITLE 26 UNITED STATES CODE.

§ 6224. Participation in administrative proceedings; waivers; agreements

(a) Participation in administrative proceedings.— Any partner has the right to participate in any administrative proceeding relating to the determination of partnership items at the partnership level.

(b) Partner may waive rights.—

(1) In general.—A partner may at any time waive—

(A) any right such partner has under this subchapter, and

(B) any restriction under this subchapter on action by the Secretary.

(2) Form.—Any waiver under paragraph (1) shall be made by a signed notice in writing filed with the Secretary.

(c) Settlement agreement.—In the absence of a showing of fraud, malfeasance, or misrepresentation of fact—

(1) Binds all parties.—A settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership taxable year. An indirect partner is bound by any such agreement entered into by the pass-thru partner unless the indirect partner has been identified as provided in section 6223(c)(3).

(2) Other partners have right to enter into consistent agreements.—If the Secretary enters into a settlement agreement with any partner with respect to partnership items for any partnership taxable year, the Secretary shall offer to any other partner who so requests settlement terms for the partnership taxable year which are consistent with those

contained in such settlement agreement. Except in the case of an election under paragraph (2) or (3) of section 6223(e) to have a settlement agreement described in this paragraph apply, this paragraph shall apply with respect to a settlement agreement entered into with a partner before notice of a final partnership administrative adjustment is mailed to the tax matters partner only if such other partner makes the request before the expiration of 150 days after the day on which such notice is mailed to the tax matters partner.

(3) Tax matters partner may bind certain other partners.—

(A) In general.—A partner who is not a notice partner (and not a member of a notice group described in subsection (b)(2) of section 6223) shall be bound by any settlement agreement—

(i) which is entered into by the tax matters partner, and

(ii) in which the tax matters partner expressly states that such agreement shall bind the other partners.

(B) Exception.—Subparagraph (A) shall not apply to any partner who (within the time prescribed by the Secretary) files a statement with the Secretary providing that the tax matters partner shall not have the authority to enter into a settlement agreement on behalf of such partner.

§ 6226. Judicial review of final partnership administrative adjustments

(a) Petition by tax matters partner.—Within 90 days after the day on which a notice of a final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable year with-

(1) the Tax Court,

(2) the district court of the United States for the district in

which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) Petition by partner other than tax matters partner.—

(1) In general.—If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), file a petition for a readjustment of the partnership items for the taxable year involved with any of the court described in subsection (a).

§ 6229. Period of limitations for making assessments

(a) General rule.—Except as otherwise provided in this section, the period for assessing any tax imposed by subtitle A with respect to any person which is attributable to any partnership item (or affected item) for a partnership taxable year shall not expire before the date which is 3 years after the later of—

(1) the date on which the partnership return for such taxable year was filed, or

(2) the last day for filing such return for such year (determined without regard to extensions).

(b) Extension by agreement.—

(1) In general.—The period described in subsection (a) (including an extension period under this subsection) may be extended—

(A) with respect to any partner, by an agreement entered into the Secretary and such partner, and

(B) with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner (or any other person authorized by the partnership in writing to enter into such an agreement),

before the expiration of such period.

(2) Coordination with section 6501(c)(4).—Any agreement under section 6501(c)(4) shall apply with respect to the period described in subsection (a) only if the agreement expressly provides that such agreement applies to tax attributable to partnership items.

(c) Special rule in case of fraud, etc.—

(1) False return.—If any partner has, with the intent to evade tax, signed or participated directly or indirectly in the preparation of a partnership return which includes a false or fraudulent item—

(A) in the case of partners so signing or participating in the preparation of the return, any tax imposed by subtitle A which is attributable to any partnership item (or affected item) for the partnership taxable year to which the return relates may be assessed at any time, and

(B) in the case of all other partners, subsection (a) shall be applied with respect to such return by substituting "6 years" for "3 years".

(2) Substantial omission of income.—If any partnership omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in its return, subsection (a) shall be applied by substituting "6 years" for "3 years".

(3) No return.—In the case of a failure by a partnership to file a return for any taxable year, any tax attributable to a partnership item (or affected item) arising in such year may be assessed at any time.

(4) Return filed by secretary.—For purposes of this section, a return executed by the Secretary under subsection (b) of section 6020 on behalf of the partnership shall not be treated as a return of the partnership.

(d) Suspension when Secretary makes administrative adjustment.—If notice of a final partnership administrative adjustment with respect to any taxable year is mailed to the tax

matters partner, the running of the period specified in subsection (a) (as modified by other provisions of this section) shall be suspended—

(1) for the period during which an action may be brought under section 6226 (and, if an action with respect to such administrative adjustment is brought during such period, until the decision of the court in such action becomes final), and

(2) for 1 year thereafter.

(f) Items becoming nonpartnership items.—If, before the expiration of the period otherwise provided in this section for assessing any tax imposed by subtitle A with respect to the partnership items of a partner for the partnership taxable year, such items become nonpartnership items by reason of 1 or more of the events described in subsection (b) or section 6231, the period for assessing any tax imposed by subtitle A which is attributable to such items (or any item affected by such items) shall not expire before the date which is 1 year after the date on which the items become nonpartnership items. The period described in the preceding sentence (including any extension period under this sentence) may be extended with respect to any partner by agreement entered into by the Secretary and such partner.

§ 6230. Additional administrative provisions

(f) Failure of tax matters partner, etc., to fulfill responsibility does not affect applicability of proceeding.—The failure of the tax matters partner, a pass-thru partner, the representative of a notice group, or any other representative of a partner to provide any notice or perform any act required under this subchapter or under regulations prescribed under this subchapter on behalf of such partner does not affect the applicability of any proceeding or adjustment under this subchapter to such partner.

§ 6231. Definitions and special rules

(c) Regulations with respect to certain special enforcement areas.—

(1) Applicability of subsection.—This subsection applies in the case of—

(A) assessments under section 6851 (relating to termination of assessments of income tax) or section 6861 (relating to jeopardy assessments of income, estate, gift, and certain excise taxes),

(B) criminal investigations,

(C) indirect methods of proof of income,

(D) foreign partnerships, and

(E) other areas that the Secretary determines by regulation to present special enforcement considerations.

(2) Items may be treated as nonpartnership items.—To the extent that the Secretary determines and provides by regulations that to treat items as partnership items will interfere with the effective and efficient enforcement of this title in any case described in paragraph (1), such items shall be treated as nonpartnership items for purposes of this subchapter.

(3) Special rules.—The Secretary may prescribe by regulation such special rules as the Secretary determines to be necessary to achieve the purposes of this subchapter in any case described in paragraph (1).

§ 6243. All shareholders to be notified of proceedings and given opportunity to participate

In the manner and at the time prescribed in regulations, each shareholder in a corporation shall be given notice of, and the right to participate in, any administrative or judicial proceeding for the determination at the corporate level of any subchapter S item.

§ 6244. Certain partnership provisions made applicable

The provisions of—

(1) subchapter C which relate to—

(A) assessing deficiencies, and filing claims for credit or refund, with respect to partnership items, and

(B) judicial determination of partnership items, and

(2) so much of the other provisions of this subtitle as relate to partnership items,

are (except to the extent modified or made inapplicable in regulations) hereby extended to and made applicable to subchapter S items.

§ 6501. Limitations on assessments and collection

(a) General rule.—Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

§ 6503. Suspension of running of period of limitation

(a) Issuance of statutory notice of deficiency.—

(1) General rule.—The running of the period of limitations provided in section 6501 or 6502 (or section 6229, but only with respect to a deficiency described in section 6230(a)(2)(A)).[1] on the making of assessments or the collection by levy or a proceeding in court, in respect of any deficiency as defined in section 6211 (relating to income, estate, gift and certain excise taxes), shall (after the mailing of a notice under section 6212(a) be suspended for the period during which the Secretary is prohibited from making the assessment or from collecting by

levy or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Tax Court, until the decision of the Tax Court becomes final), and for 60 days thereafter.

(2) Corporation joining in consolidated income tax return.—If a notice under section 6212(a) in respect of a deficiency in tax imposed by subtitle A for any taxable year is mailed to a corporation, the suspension of the running of the period of limitations provided in paragraph (1) of this subsection shall apply in the case of corporations with which such corporation made a consolidated income tax return for such taxable year.

(h) Cases under title 11 of the United States Code.—The running of the period of limitations provided in section 6501 or 6502 on the making of assessments or collection shall, in a case under title 11 of the United States Code, be suspended for the period during which the Secretary is prohibited by reason of such as from making the assessment or from collecting and—

(1) for assessment, 60 days thereafter, and

(2) for collection, 6 months thereafter.

§ 301.6231(c)-7T Bankruptcy and receivership (Temporary).

(a) Bankruptcy. The treatment of items as partnership items with respect to a partner named as a debtor in a bankruptcy proceeding will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the parner with respect to which the United States could file a claim for income tax due in the bankruptcy proceeding shall be treated as nonpartnership items as of the date the petition naming the partner as debtor is filed in bankruptcy.

(b) Receivership. The treatment of items as partnership items

with respect to a partner for whom a receiver has been appointed in any receivership proceeding before any court of the United States or of any State or the District of Columbia will interfere with the effective and efficient enforcement of the internal revenue laws. Accordingly, partnership items of such a partner arising in any partnership taxable year ending on or before the last day of the latest taxable year of the partner with respect to which the United States could file a claim for income tax due in the receivership proceeding shall be treated as nonpartnership items as of the date a receiver is appointed in any receivership proceeding before any court of the United States or of any State or the District of Columbia.

T.D. 8128, 3/2/87.